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ABSTRACT

The United States Supreme Court, in a 5-4 decision in the Rosenberger case, ruled that the University of Virginia had violated the free speech clause of the First Amendment of the United States Constitution by refusing to subsidize a Christian student publication. The magazine, "Wide Awake," was published by a student organization that was recognized by the University as a "contracted independent organization." There were three fundamental issues considered: (1) the use of student fees; (2) the religious establishment clause of the First Amendment; and (3) the free speech clause of the First Amendment. The Court ruled that financing the magazine from student activity fees did not violate the establishment clause of the First Amendment. Courts have previously ruled that while the right of institutions has been upheld to maintain mandatory fees, these must be used to provide a forum of varying ideas and not one political or ideological stance. In Widmar v. Vincent, the Supreme Court had previously upheld a lower court ruling that students' religious activities were protected by the free speech clause of the First Amendment. Therefore, while higher education institutions may require student activity fees, they must be utilized to enhance, not hinder, the exercise of free speech and religion. (JLS)

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# What the Rosenberger Decision Means

LEE M. LASSNER

In the summer of 1995, the U.S. Supreme Court, in a 5-4 decision, ruled that the University of Virginia had violated the Free Speech Clause of the First Amendment by refusing to subsidize a Christian student magazine entitled, Wide Awake. The magazine was published by a student organization called Wide Awake Productions (WAP) which was recognized by the University as a "Contracted Independent Organization." (CIO).

Gibbs and Gehring (1996) in their review of the Rosenberger case concluded that "only future decisions by the courts will define what is required by the neutrality of the Establishment Clause and how that is to be balanced against the Free Speech Clause of the First Amendment."

However, there is another approach which can be taken. There were in fact three fundamental issues which came into play in the Rosenberger case: 1) The use of student fees; 2) The religious Establishment Clause of the First Amendment; and 3) The Free Speech Clause of First Amendment. By analyzing the historical development of each of these three issues, it will become easier to

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ascertain what the Rosenberger decision means for both the present and the future. First, some background.

Gibbs and Gehring explain that while WAP's purpose was to publish a Christian magazine, WAP wasn't a "religious organization." In fact, religious organizations are denied CIO status as a rule. WAP was denied an allocation from the Student Activity Fund (SAF) for its publication expenses due to the Student Council's decision that Wide Awake was a "religious activity" or an activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality" (Rosenberger v. Rector and Visitors of the University of Virginia, 1995, p. 4704). The actions of the SAF however, were contrary to the rule of no subsidy for "religious activity." The SAF provided funding for a Muslim student publication "Al-Salam" which published pieces to "promote better understanding of Islam to the University Community" as well as to a humor magazine "which published satirical articles targeting Christianity" entitled The Yellow Journal (p.4711). The SAF's denial of funding to WAP based on university policy of preventing use of student fees to support "religious activities" made no sense given the aforementioned actions.

The U.S. Supreme Court ruled that financing Wide Awake from the student activity fees did not violate the Establishment Clause of the First Amendment:

"The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life...The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns." (Rosenberger, 1995, p. 4708).

Let us now examine the three fundamental issues.

Student Fees

The purpose of student fees or what is now known as "student activity fees" is in order to conduct programs. These fees are generally collected from all students and then allocated to the various student organizations. A committee usually oversees how much each organization receives from the student activity

fund (Barr, 1988).

We learn from Meabon, Alexander, and Hunter (1979) that as early as 1882, the courts have held that for all items with the exception of teaching, the imposition of mandatory student fees by the governing boards of colleges and universities is permissible. In 1934, the Montana Supreme Court ruled that the responsibility to manage and control institutions with respect to both business and finance "carries with it the implied power to do all things necessary and proper...which would include the exaction of fees not prohibited, if fees are necessary to the conduct of the business of the institutions" (State v. State Board of Education, 1934).

It should be noted that while the student body can exercise influence over how activity fees can be utilized, the final say in the matter rests with the Board of Trustees. This has been upheld in both Stringer v. Gould (1970) and Erzinger v. Regents of University of California (1982). In Galda v. Bloustein (1982) students brought suit challenging Rutgers' policy of charging a mandatory fee to support "student-sponsored programs and organizations, such as PIRG, that otherwise would not qualify for university financial support."

Despite the fact that Rutgers argued that the mandatory fee was justified because it served legitimate educational purposes, the institution granted a refund to any student upon request. Nevertheless the Third Circuit reversed the district court decision in favor of Rutgers, and remanded the case back to the district court which reversed its earlier ruling and upheld Rutgers.

However three years later, a second suit was filed against Rutgers which sought injunctive relief from the appelate court with respect to the fee. Interestingly in this case, the Third Circuit Court reversed itself stating that "the University haspresented no evidence, nor do we believe it could, that the educational experience which it cites as justification could not be gained by other means which do not trench on the plaintiff's constitutional rights."

The issue was there is a clear line to be drawn between "permissible mandatory fees" and "impermissible mandatory fees." The court ruled that due to PIRG's independent status, this in itself made a crucial difference between PIRG and the other campus groups:

"PIRG's ineligibility for student activity funds-precisely because of the independent status-distinguishes PIRG from the other groups or campus which are

funded by a standard 'student activity fee.' This fee, a lump sum used to subsidize a variety of student groups, can be perceived broadly as providing a 'forum' for a diverse range of opinion. The PIRG fee, in contrast, was segregated from the other charges listed on the students' term bills, and provides support for only one organization" (Galda v. Bloustein, 1982).

It should be noted that while the courts upheld the right of institutions to maintain mandatory fees, they must be used to "provide a forum of varying ideas not one political or ideological stance" (Barr, 1990).

Religion

The First Amendment to the Constitution of the United States states: "Congress shall make no law respecting an establishment of religion , or prohibiting the free exercise thereof." In the 1960's, school prayer decisions raised questions concerning "quasi-religious" practices in public colleges (Barr, 1990).

One of the most significant Supreme Court decisions with respect to

religion is Lemon v. Katzman (1971) in which the three-pronged test was adopted. The Court stated: "In order to determine whether the government entanglement with religion is excessive, we must examine 1)the character and purposes of the institutions which are benefited; 2)the nature of the aid that the state provides; and 3)the resulting relationship between the government and the religious authority."

Barr (1990) stated simply that "the Supreme Court held that acts of the state must have a secular legislative purpose and that there may not be excessive governmental entanglement with religion." It should be noted that the issue of freedom of religion on college campuses was given new impetus in the 1970's due to decisions allowing socialists (Healy v. James, 1972) and homosexuals (Gay Students Organization of the University of New Hampshire v. Bonner, 1974) to use public institutional facilities "for meetings and other purposes." In Hunt v. McNair (1973), the Supreme Court ruled that the primary effect of any act by the state could neither aid nor inhibit the practice of religion. We find that neutral accomodation is permitted in the facilities of a state university (Keegan v. University of Delaware, 1975). Further, we discover that even rental of public facilities on an occasional basis did not violate separation of church and state due to the fact that a fair rental value was charged (Pratt v. Arizona Board of Regents,

1974).

It wasn't until 1979 however, that two fundamental principles were established by the Fifth Circuit Court regarding freedom of religion: 1)Vague measures regarding religious activities permit low-level administrators to act as censors, and such measures cannot be permitted; and 2)To treat exchanges of money for commerical purposes amounts to discrimination on basis of content; such discrimination is invalid (International Society for Krishna Consciousness of Atlanta v. Eaves, 1979).

Kaplin (1985) explains that in Widmar v. Vincent the U.S. Supreme Court established important rights for student religious groups at colleges and universities. The Supreme Court upheld the U.S. Court of Appeals' decision that students' religious activities were protected by the free speech clause of the First Amendment. In 1972, the University of Missouri-Kansas City (UMKC) issued a regulation prohibiting the use of university buildings for religious purposes. But when this regulation was applied to a religious group on campus called Cornerstone, the U.S. Court of Appeals for the Eighth Circuit reversed the district court's ruling and stated that the university had violated the rights of the students

by "placing content-based restrictions on their speech." The Supreme Court agreed with the appelate court (Kaplin, 1985).

It should be noted however, that there are five fundamental limits to the Widmar decision:

1)Widmar does not require or permit institutions to create forums which give preferential treatment to religious groups, nor does it allow institutions to create forums especially for religious groups; 2)Widmar does not require institutions to create a forum for student groups, or maintain a forum for student groups; 3)Widmar does not require institutions to make all of its facilities that are created for the express purpose of establishing a forum; 4)Widmar does not require institutions that establish such forums to sacrifice its right to regulate the use of its forum' facilities; and 5)Widmar does not require institutions to eliminate all "content-based restriction" with respect to access to a forum. What it does require is that any such regulation be "necessary to serve a compelling state interest" and be "narrowly drawn to achieve that end."

Speech

As early as 1941, the Supreme Court ruled that the curtailment of free speech was unconstitutional unless it could be shown that there existed "a clear and present danger" to the community (Bridges v. California, 1941). The Court went on to say "substantive evil must be extremely serious, and the degree of immence extremely high, before utterances can be punished" (Barr, 1988). In Dixon v. Alabama State Board of Education (1961), the Fifth Circuit Court ruled that students who are expelled from a tax-supported college have the right to due process in the form of "notice and some opportunity for hearing" (Kaplin, 1985).

In Pickering v. Board of Education (1968), a public high school teacher had been dismissed for writing a letter to a local newspaper in which he criticized the board of education financial plans. Pickering brought suit alleging his first amendment's right to freedom of speech had been violated. There were five fundamental issues to be resolved: 1)Is there a close working relationship between the teacher and those he criticized?; 2)Is the substance of the letter a matter of legitimate public concern?; 3)Did the letter have a detrimental impact on the

administration of the educational system?; 4)Was the teacher's performance of his daily duties impeded?; and 5)Was the teacher writing in his professional capacity or as a private citizen?

Kaplin explained that the Court based its ruling on the following:

1)Pickering had no working relationship with the board; 2)The letter dealt with a matter of public concern; 3)Pickering's letter had no detrimental effect on the schools because it was meant with public apathy; 4)Pickering's performance as a teacher wasn't hindered by the letter; and 5)Pickering wrote the letter as a citizen, not as a teacher. Taking all of the above characteristics into consideration, the Court ruled that freedom of speech outweighed the interest of the administration which had presented no proof that Pickering's statements were false.

It should be noted that there are restrictions on freedom of speech with regard to demonstrations. Such demonstrations must not "compromise the freedom of movement of nondemonstrations, disrupt meetings, or disturb the study and sleep of others (Buttney v. Smiley, 1968). In Tinker v. Des Moines Independent School District (1969), several high school students had been

suspended for wearing black armbands in protest of the Vietnam War. The Supreme Court ruled that "protest was a nondisruptive exercise of free speech and could not be punished by suspension from school" (Kaplin, 1985). The Court added that the First Amendment's protection of free speech includes the protection of "symbolic acts" which are done "for the purpose of expressing certain views."

The issue of voter canvassing came up in the case of James v. Nelson (1972) in which Northern Illinois University had modified the prohibition under specified conditions. The referendum was to be voted on and require two-thirds of the students in each dormitory before it could be implemented. The court ruled that the university's blanket prohibition on canvassing was an infringement of First Amendment rights, and a requirement that this prohibition could be removed only by a two-thirds vote of the students in each dormitory and each floor was also an infringement on the rights of those students who would desire a liberalized canvassing policy. However, the court did rule that if the students did not favor canvassing, the university had a right to prohibit door-to-door non-commerical canvassing in residence halls (Brush v. Penn State University, 1980). In contrast,

the court ruled in American Future Systems v. Pennsylvania (1980) that the "commerical vendor had no First Amendment right to disseminate information in any manner he chooses."

There are three basic restrictions: 1)Commerical solicitors do not have freedom to roam about selling their products on residence hall floors; 2)Vendors may be prohibited from taking orders and receiving funds anywhere in the residence hall except in a student's own room and only then if previously and specifically invited to be there by that resident; and 3)Institutions may oversee any commercial activity authorized in a residence hall to ensure the legality of actions whatever they may be (Barr, 1990). Further, the court held that a university can regulate not only the time, but "the place and manner" of political candidates who choose to conduct campaign activity in residence halls at public colleges. The court in addition to this ruled that the central areas of the residence halls provided "a sufficient channel" for the purpose of communication and denied the complainant the right to go from door to door (Harrell v. Southern Illinois University, 1983).

In Professional Association of College Educators v. El Paso County

Community College (1984) exercise of free speech was held to be lawful even in cases of job termination "where all due process requirements" had to be met. However, the law draws a fine line between "free speech" and "slander" as noted in Landrum v. Eastern Kentucky University (1984), a case in which a professor "verbally assaulted the administration over individual preferences." The professor was discharged and a federal district court upheld the dismissal. Similarly, in Bethel School District #403 v. Fraser (1986) the Supreme Court upheld the Tinker decision, but ruled that vulgar and indecent language could be disciplined.

## Analysis

The in-depth analysis of student fees, freedom of religion and speech is meant to bring the Rosenberger decision into focus with respect to historical developments. First, while higher education institutions may require student activity fees, they must be utilized to enhance, not hinder the exercise of free speech and religion. Second, freedom of religion is closely entwined with freedom of speech when it comes to higher education. It is not unconstitutional to

voice religious views on college campuses. It is unconstitutional however, to restrict such behavior on the basis of religious content. Third, freedom of speech is not absolute. No one has the right to yell fire in a crowded theatre, as the saying goes. No one has the right to use indecent or vulgar language. You can't ban a public speaker simply because his or her mere presence may cause riotous conduct. There must first exist "a clear and present danger" before an institution could ban a speaker. Yet even taking this precaution may not be enough. In Bridges v. California (1941) the Supreme Court held that the evil must be "extremely serious" and "the degree of imminence extremely high" before utterances could be punished. But by then it may be too late and lives may be threatened or even lost in the resulting fury.

What practical solution is there? The easiest solution of course is for colleges and universities to ban all public speakers. It is only when they allow certain individuals to speak that they open the door to litigation. However, with respect to the Rosenberger case, the problem did not concern public speakers, but refusing to subsidize a Christian student magazine on campus. Nevertheless the same principle holds. As Justice O'Connor said: "The nature of the dispute does

not admit of categorical answers, nor should any be inferred from the Court's decision today.

"...Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective."

In other words, the issue is freedom of speech. Needless to say, the prohibition against subsidizing Wide Awake by the Student Council did constitute a clear violation of freedom of speech. Gibbs and Gehring's position that only future decisions by the courts will help clarify the neutrality of the Establishment Clause does not ring true in light of past court decisions. The courts have made it perfectly clear that religious speech or even support of religious groups on campus by institutions of higher learning do not in themselves constitute an establishment of religion, nor do they jepordize or prejudice those who have no religious belief (Widmar v. Vincent, 1981; Keegan v. University of Delaware, 1975; Pratt v. Arizona Board of Regents, 1974). In this sense, there is a very thin line between freedom of religion and freedom of speech.

Ultimately, the issue at hand is not freedom of religion or freedom of speech, but simply freedom.

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